

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JAMES V. PARKER,	)	
	)	
Claimant,	)	<b>IC 04-004041</b>
v.	)	
	)	
IDAHO FRESH PAK, INC.,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
Employer,	)	<b>AND RECOMMENDATION</b>
and	)	
	)	
LIBERTY NORTHWEST	)	
INSURANCE CORPORATION,	)	<b>FILED AUG 7 2006</b>
	)	
Surety,	)	
Defendants.	)	
_____	)	

**INTRODUCTION**

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Pocatello, Idaho, on February 14, 2006. David Pena represented Claimant. Monte Whittier represented Defendants. Two post-hearing depositions were taken, of which, Mr. Pena attended one. Defendants submitted the only brief. The case came under advisement on June 23, 2006, and is now ready for decision.

**ISSUES**

After due notice the issues are as follows:

Whether and to what extent Claimant is entitled to the following benefits:

- (1) temporary disability (TTD);
- (2) permanent partial impairment (PPI);
- (3) disability in excess of impairment;
- (4) medical care;
- (5) retraining; and
- (6) attorney fees.

With their brief, Defendants moved for dismissal as a sanction for Claimant's failure to file briefs as scheduled by written order. While the Commission would prefer that any party electing not to file a brief would inform us in writing, the order merely sets forth the deadline after which it would be untimely to file a brief, it does not require one be filed. Defendants' motion to dismiss is denied.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he suffered a crush injury to his left foot on August 18, 2003, when a motor fell on it. Treatment required the amputation of his large and second toe and required multiple surgeries which included his third toe as well. Claimant suffered depression and substantial weight gain. His methamphetamine abuse became more severe as a result of the accident, but he is clean now. He is entitled to continued TTD benefits until his psychological and weight issues are resolved and stable. He is significantly impaired and permanently disabled despite physicians' refusal to impose restrictions. He seeks retraining as a truck driver. Defendants' unreasonable actions should result in the assessment of attorney fees.

Defendants contend they paid Claimant's reasonable medical expenses related to his left foot and the 10% PPI recommended by Claimant's treating physician. They paid TTD benefits until Claimant's treating physician released him to light duty. Employer had work available, but it also has a no-tolerance drug policy and fired him for a positive drug test. Claimant should not be entitled to psychological medical care or further TTDs because such are unrelated to the accident and injury. Claimant has not shown retraining is reasonable, nor that he suffers any permanent disability beyond impairment related to the accident. Defendants' actions were not unreasonable and attorney fees should not be awarded. Claimant is not credible in his reports of drug use or physical abilities. Defendants raise a new issue, that any benefits

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should be precluded or reduced by operation of Idaho Code § 72-435 as it relates to Claimant's drug abuse.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, and Employer's human resource manager Glen Yearsley;
2. Claimant's exhibits A – J;
3. Defendants' exhibits A – Z and AA – FF; and
4. Post-hearing depositions of psychologist Michael H. McClay, Ph.D., and psychiatrist Robert Friedman, M.D.

After considering the record and Defendants' brief, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant worked for Employer and suffered a compensable accident and injury on August 18, 2003. A motor dropped onto his left foot, crushing some of his toes. He was 39 years old at the time of the accident.

2. Claimant sought medical attention. Gilbert Crane, M.D., treated Claimant and amputated Claimant's large and second left toes. Additional surgeries, including a debridement and skin graft, were required in September 2003.

3. Employer's written policy required a drug test following every accident and at certain other occasions. Claimant tested positive for methamphetamine. He was fired under Employer's written zero tolerance policy.

4. On November 11, 2003, Dr. Crane noted some persistent swelling and drainage. He allowed Claimant to work a modified duty of 4 hours per day and anticipated a 6-month

recovery before the skin graft would be stable.

5. On December 11, 2003, Claimant visited Dr. Crane with his attorney. Issues of weight gain and depression were addressed. Dr. Crane relaxed Claimant's temporary restrictions and ordered physical therapy.

6. On January 13, 2004, Dr. Crane released Claimant to return to full-duty work. He noted Claimant "feels he could go back to regular duty work." Dr. Crane noted he did not anticipate any permanent restrictions, but advised a 6-week phase-in to full duty. He anticipated January 20, 2004, as Claimant's date of medical stability.

7. On February 4, 2004, Dr. Crane confirmed his opinion that Claimant was medically stable without restrictions, and with 10% whole person PPI from the amputations and effect on Claimant's third toe.

8. ICRD assisted Claimant from November 4, 2003 to September 16, 2004. ICRD concluded Claimant could have returned to his time of injury position but for the termination for drug abuse.

9. On November 9, 2004, psychologist Mark D. Corgiat, Ph.D., evaluated Claimant's psychological status. He opined Claimant suffered from a major depressive disorder caused "to some extent" or was "predominant[ly] cause[d]" by the accident and subsequent medical interventions. He opined Claimant was not psychologically stable and was unable to work. He referred Claimant for treatment by William Hazle, M.D. On September 12, 2005, Dr. Corgiat opined Claimant needed treatment for chemical dependency; that the chemical dependency preexisted the accident and injury; and that it prevented Claimant from fully recovering from effects of the accident.

10. On January 10, 2005, Dr. Hazle evaluated Claimant. He diagnosed a major

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depressive episode and stimulant dependency in remission. He continued to provide psychological treatment in conjunction with William Pettingill, M.S.W.

11. Claimant attended the LifeFit program. He tested positive for methamphetamine on three of the four weekly tests. His weight was reliably measured at 416 on a Friday and 411 on a Monday and 414 the following Monday. Psychologist Michael McClay, Ph.D., opined Claimant's psychological condition was unrelated to the accident and was preexisting and related to Claimant's long history of drug abuse; and that Claimant's psychological condition did not prevent him from working. At the end of the LifeFit program, psychiatrist Robert Friedman, M.D., opined on July 20, 2005, that Claimant was stable without restrictions; that he agreed with Dr. Crane's PPI evaluation; that Claimant's drug use was an obstacle to recovery; and that Claimant's psychological, drug, and sleep complaints were unrelated to the accident.

### **Discussion and Further Findings**

12. **Credibility.** Claimant was imprisoned in the 1990s for felonies associated with his illegal methamphetamine use. He testified at hearing and made statements to physicians and others, which testimony and statements were inherently improbable. His testimony was occasionally irreconcilably inconsistent with indisputable evidence of record. His demeanor on the witness stand showed evasiveness and his testimony appeared at times carefully constructed to mislead without being frankly untrue. Where Claimant failed to be forthright about disprovable matters such as how many toes were amputated, one need not seriously take Claimant at his word about subjective physical and psychological symptoms, weight gain, drug use, and other matters about which his testimony was inconsistent with other evidence or inherently improbable.

13. **Permanent Impairment.** Dr. Crane's PPI rating of 10% is not disputed.

Because of the inclusion of the third toe, the amputation schedules of Idaho Code § 72-428 are not the sole basis for PPI. Claimant showed he suffered PPI of 10% of the whole person.

14. **Temporary disability.** A claimant is entitled to temporary disability benefits while in a period of recovery. Claimant was declared medically stable on February 4, 2004, by Dr. Crane. Further, Dr. Crane released Claimant to 4 hours of light duty as of November 11, 2003, and to unrestricted hours of light duty on December 11, 2003. Employer established it had available light duty to satisfy the standard set forth in Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986), for determining available work. Claimant's own illegal act precluded Employer from offering Claimant the available work.

15. Defendants paid TTD benefits from the date of accident, August 18, to the date of Dr. Crane's release to light duty, November 10, 2003, and again from January 24, 2005 through July 25, 2005. The record does not show that Claimant was paid temporary partial disability for the period between November 11 to December 11, 2003, when Dr. Crane relaxed the temporary restrictions. If unpaid, Claimant should be entitled to temporary partial disability for that period. Claimant failed to show he was temporarily disabled by the accident for any period after Dr. Crane found Claimant stable without restrictions on February 4, 2004. Defendants should be entitled to credit for TTD paid in 2005.

16. **Permanent disability.** Permanent disability is defined and evaluated according to statute. Idaho Code §§ 72-423, 424, 425, 430(1). Some factors are expressly defined by statute and other unexpressed factors may be considered. Idaho Code § 72-430(1). Wage earning capacity may be one factor among others considered. Baldner v. Bennet's, 103 Idaho 458, 649 P.2d 1214 (1982).

17. Claimant failed to show by any standard or set of factors that he suffered

permanent disability in excess of PPI. Absent his self-serving testimony, the record offers no basis for any permanent disability.

18. **Retraining.** Defendants objected to the inclusion of an issue of retraining. That objection is overruled where the issue was duly set forth in more than one notice of hearing prior to the hearing in this matter. However, here too, absent Claimant's self-serving testimony, the record offers no basis upon which an award of retraining would be reasonable. Claimant failed to show a basis for an award of retraining benefits.

19. **Medical care.** A claimant is entitled to reasonable medical care as required by his treating physicians. Idaho Code § 72-432. Defendants did so. They paid for surgeries and treatment through his date of stability and beyond. When Claimant raised additional medical and psychological issues – although ultimately shown to be unrelated to the accident and injury – they began paying these for as long as some perception of causal link remained unrefuted. Defendants paid for all reasonable medical care due Claimant as a result of the subject accident.

20. **Attorney fees.** Attorney fees shall be awarded where the Commission finds the conditions of Idaho Code § 72-804 are satisfied. Bradley v. Washington Group International, 141 Idaho 655, 115 P.3d 746 (2005). The record shows no basis upon which to conclude that Claimant should be awarded attorney fees.

### **CONCLUSIONS OF LAW**

1. Claimant suffered a compensable accident and PPI rated at 10% of the whole person as a result. Defendants are entitled to credit for PPI amounts paid.

2. Claimant failed to show he is entitled to TTD benefits after November 10, 2003, and temporary partial disability benefits after December 11, 2003; Defendants are entitled to credit for excess temporary disability payments made in 2005.

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3. Claimant failed to show he is entitled to permanent disability in excess of PPI.
4. Claimant failed to show he is entitled to additional medical care benefits.
5. Claimant failed to show he is entitled to retraining benefits.
6. Claimant failed to show he is entitled to an award of attorney fees.

### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 20<sup>TH</sup> day of July, 2006.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>TH</sup> day of AUGUST, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

David Peña  
P.O. Box 697  
Burley, ID 83318

Monte R. Whittier  
P.O. Box 6358  
Boise, ID 83707

db

/S/ \_\_\_\_\_